No. 20964

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRANSMARINE NAVIGATION CORPORATION AND ITS SUBSIDIARY, INTERNATIONAL TERMINALS, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR THE NATIONAL LABOR RELATIONS BOARD

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This reply brief is directed to arguments in the Company's brief heretofore not asserted, and therefore not wholly dealt with in the Board's opening brief.

1. The Company devotes almost its entire brief to a contention that the Act imposed no obligation to bargain with the Union concerning the decision to close the Los Angeles terminal, enter the joint venture at Long Beach and replace the unit of guards with contract guard service. However, as shown in our opening brief (pp. 9–10), the Company made no contention before the Trial Examiner and the Board that a managerial decision of this character was not a mandatory subject of bargaining. The Company's

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defense was that it had fully satisfied the bargaining requirements involving both the decision and the effects thereof on the employees.[1] (See, R. 33–34).

The Company now seeks to rely on decisions of the Third and Eighth Circuits (see Bd. Br. 10, n. 5), holding that a managerial decision may be made unilaterally when it involves a basic redirection of the enterprise through a major re-investment of capital or relocation in another market. As we show in our opening brief (p. 10, n. 5) where the decision involves such elements, in the view of those Circuits, prior consultation regarding the decision is not required

[1] As set forth in our brief (p. 10, n. 6) after the Board's decision the Company unsuccessfully moved for reconsideration on the ground that the Supreme Court's decision in *N.L.R.B.* v. *Darlington Mfg. Co.*, 380 U.S. 263, barred a remedial order. As we show, this assertion rested on the inaccurate claim that the Company had totally and permanently gone out of business. In this connection, see *N.L.R.B.* v. *Wayne Johnson* (*Carmichael Floor Covering Co.*), No. 20,760 (C.A. 9), October 17, 1966, (63 LRRM 2331), decided after submission of the Board's brief, where this Court affirmed the Board's holding that the employer violated the bargaining requirements of the Act by unilaterally contracting out its floor covering installation work. The Court characterized *Darlington*, relied on by the employer, as "not in point," as "[t]hat case involved the closing of an entire plant, not the continuance of essentially the same operation by substituting independent contractors for the employer's own workers" (63 LRRM at 2332, n. 2). The Court's decision supports the Board's decision herein in other respects. Thus, the Court found no merit in the employer's assertion (see, Comp. Br. 3–4) that the absence of a clear union request to bargain about a decision affecting unit employment was a defense when the employer makes the decision unilaterally and then confronts the union with a "*fait accompli*" (63 LRRM at 2332, n. 1). Further, the Court enforced *inter alia* a similar backpay order. (See Bd. Br. 16.)

under the Supreme Court's holding that a decision to displace unit jobs with an independent contractor is a mandatory subject of bargaining. *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203. Rather, in their view the statute requires only negotiations concerning the *effects* of the decision. However, as shown, the Company's decision to participate in a joint venture in the same area with the same customers and work force except for one department of employees which it arranged to replace with an independent contractor, is not the equivalent of the "basic" managerial decisions involved in the Third and Eighth Circuit cases.[2] Indeed, before the Board the Company indicated that the issue was whether it had met its statutory obligation to confer with the employees' representative before displacing unit jobs, and the Company defended its conduct on the ground that it was similar to employer conduct in Board cases where it was held that the representative had been given adequate opportunity to negotiate before the decision was made and implemented (R. 25–26,

[2] In *Ozark Trailers, Incorporated, et al.*, 161 NLRB No. 48, October 27, 1966, (63 LRRM 1264), decided after the Board's brief and involving a unilateral decision to shut down an entire plant, the Board indicated its disagreement with the principle that where the decision involves basic changes in capital structure or relocation of an enterprise in a different market *Fibreboard* requires negotiations on only the effects of the decision. Although, as demonstrated, the instant case does not raise this issue, in view of the Board's thorough examination of *Fibreboard* the Court may desire to have before it the Board's decision in *Ozark*. Therefore, with the Trial Examiner's recommended decision omitted, we have for the Court's convenience included the Board's decision, as yet not reported in the bound volumes, as an appendix to this brief, *infra*.

28, 36). In sum, it is manifest, and until now the Company has not suggested otherwise, that the unilateral action the Board found unlawful here involved "the replacement of employees in the existing bargaining unit with those of an independent contractor." *Fibreboard, supra,* 379 U.S. at 215.

2. Even under the court holdings on which the Company seeks to rely, the Company failed to give the Union the required opportunity to negotiate concerning the effects of the decision to abolish unit employment. Accordingly, those holdings support enforcement of the Board's order on this adequate ground. The Company states (Br. 5, 6, footnote) that the Board held solely that the Company violated the statutory bargaining obligation by failing to bargain with the Union concerning the decision to participate in the joint venture and to displace the unit of guards with contract guard service, and that the Board did not hold that the Company failed to bargain with the Union about the effects of the decision on unit employment. This is a misstatement. Clearly at issue was performance of both the duty to discuss the proposed decision with the Union and the duty, if not persuaded to avoid or modify the decision, to discuss its effect on the employees. The Board determined that the Company not only bypassed the Union in making the decision, but also gave it no opportunity

for meaningful "bargaining with respect to the effect of the [decision] on the Union members" (R. 25–26, 35–36). Furthermore, in the circumstances presented here, the General Counsel elected not to seek the usual remedy for the unilateral decision—that is, restoration of the unit and opportunity for the bargaining representative to negotiate concerning alternatives to the unit's abolishment. Thus, the central issue presented was whether the Company, before discharging the guards, had provided the Union with opportunity to bargain concerning the effects of the decision, and should therefore not be held for the usual backpay liability. As we show in our opening brief, the Trial Examiner and the Board properly held that until the Company offered to confer with the Union on all matters in dispute on June 25, 1964—several months after the Company entered the joint venture and replaced its guards—the Company had not fulfilled its duty to engage in "collective bargaining within the Act's meaning about the status of the terminated employees" (R. 26, 36). The Company's statement that the Board did not find that the Company breached its duty to negotiate concerning the effects of the decision is, in short, squarely in conflict with the major thrust of the Board's decision. In addition, as shown by the discussion, *supra,* the contention is at variance with the Company's arguments in the earlier stages of this proceeding.

CONCLUSION

For the reasons stated herein and in our main brief, we respectfully submit that a decree should issue enforcing the Board's order in full.

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NOVEMBER 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this court, and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

United States of America before the National Labor Relations Board

Case No. 17–CA–2414

Ozark Trailers, Incorporated and/or Hutco Equipment Company and/or Mobilefreeze Company, Inc. and International Union, Allied Industrial Workers of America, Local No. 770, AFL–CIO

Decision and Order

On December 14, 1964, Trial Examiner Sidney S. Asher, Jr., issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Decision attached hereto. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed with respect to such allegations. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision, and also filed a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications:

1. The Trial Examiner found, and we agree, for the reasons set forth in the Trial Examiner's Decision, that Ozark Trailers, Incorporated, herein referred to as Ozark, Hutco Equipment Company, herein referred to as Hutco, and Mobilefreeze Company, Inc., herein referred to as Mobilefreeze, together constitute a single employer within the meaning of the Act. We further find, from the same record evidence, that Ozark, Hutco, and Mobilefreeze, during the critical period herein involved, functioned and operated as a single, integrated enterprise engaged principally in the manufacture, distribution, sale, and service of refrigerated truck bodies.

2. The Trial Examiner found that Respondents interfered with, restrained, and coerced the Ozark employees in violation of Section 8(a)(1), and discriminated against them in regard to their tenure of employment in violation of Section 8(a)(3) by locking out said employees on December 19, 1963, in retaliation for the Union's demand that certain dischargees be reinstated. However, the Trial Examiner found that Respondents' conduct in this regard was not violative of Section 8(a)(5) as alleged in the complaint. No exceptions were filed to these findings, and we hereby adopt them *pro forma.*

3. The Trial Examiner further found that the Respondents violated Section 8(a)(1) and (5) of the Act by closing the Ozark plant on March 1, 1964, without prior notice to, or consultation with, the employees' authorized representative at the Ozark Plant.[1] We agree with this finding of the Trial Examiner.

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[1] The complaint also contained an allegation that by terminating the employment of the employees at the Ozark plant on or before its final closing, and thereafter failing and refusing to reinstate them, Respondent also violated Section

As a result of a Board-conducted election held on March 1, 1963,[2] the Union was certified on March 11, 1963, as the exclusive bargaining representative of all the employees of Ozark, excluding office clerical employees, watchmen and guards, professional employees, the plant manager, and all other supervisors as defined in the Act. On April 16, 1963, Ozark and the Union executed a collective bargaining agreement for a term of 1 year, which provided for automatic renewal thereafter in absence of notice from either of the parties to the contrary. The contract continued in effect during the events set forth below.

Near the end of January 1964, Ozark's Board of Directors,[3] for economic reasons, determined to close the Ozark plant located in Ozark, Missouri. Sometime prior to February 21, 1964, the plant manager of the Ozark plant, Holekamp, was informed that the plant was to be closed, but, apparently, he was not notified that the plant closing would be permanent.

At the time, there were four truck bodies nearing

8(a)(1) and (3) of the Act. The Trial Examiner found, however, on the basis of the record evidence, that Respondents' decision to close down the Ozark plant "was based primarily upon economic considerations," and that the General Counsel failed to demonstrate by a fair preponderance of the evidence that the decision was motivated to any appreciable extent by union animus or a desire to get rid of the Union. Accordingly, the Trial Examiner granted Respondents' motion to dismiss this particular 8(a)(3) allegation of the complaint. As no exceptions were filed to these findings or ruling of the Trial Examiner, we hereby adopt them *pro forma*.

[2] Case No. 17–RC–4042.

[3] At the time, Henry Warren, Jr., John B. Latzer, Henry G. Drosten, and William B. Westfall served as Ozark's Board of Directors. In addition, Warren, Latzer, and Drosten were the principal stockholders of Ozark, Mobilefreeze, and Hutco, and also served as the Board of Directors of Mobilefreeze and Hutco.

completion in the plant. Thereafter, it appears that as each truck body was completed, employees no longer needed were laid off on a seniority basis. The first reduction in force occurred on February 20, 1964. At that time, Holekamp told Union steward Henry that the layoff was due to lack of work, that it was a temporary layoff, and that he could not promise when Henry would be recalled. It is clear that Henry was not informed that the plant was being closed permanently. On February 27, 1964, the office manager, and on the following day the remaining production employees were terminated. By March 1, 1964, the four truck bodies having been completed, the plant was closed. Thereafter, plant manager Holekamp was transferred to the Mobilefreeze plant in Parsons, Kansas, where he became manager of the truck body manufacturing operation in that plant. Most of the equipment located at the Ozark plant was then moved to the Mobilefreeze plant for storage.

The record shows that, prior to its shutdown, the Ozark plant was engaged almost exclusively in manufacturing refrigerated truck bodies for Mobilefreeze. Normally, the materials required for the manufacturing operation were ordered by Mobilefreeze and shipped to the Ozark plant. After the truck bodies were made at Ozark, they were returned to Mobilefreeze for distribution and sale. It also appears that in addition to the truck bodies made at the Ozark plant, other truck bodies were manufactured at the Mobilefreeze plant in Parsons, Kansas. However, the manufacturing operations at the Mobilefreeze plant did not increase substantially after the closing of the Ozark plant. Instead, it appears from the record that after the Ozark plant closed, Mobilefreeze there-

after contracted with Schodorf Body Company in Columbus, Ohio, for the manufacture of truck bodies.[4]

It is clear from the record evidence that the Ozark plant was closed and dismantled without notice to and without affording the Union an opportunity to bargain with respect to the effects of Respondent's decision upon the employees. In *N.L.R.B.* v. *Royal Plating & Publishing Co.,* 350 F. 2d 191 (C.A. 3), the Court aptly described Respondents' obligation to notify and bargain with the Union over the effects of such a decision to close the plant in the following manner:

> However, under circumstances such as those presented by the case at bar an employer is still under an obligation to notify the union of its intentions so that the union may be given an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision. *N.L.R.B.* v. *Rapid Bindery, Inc.,* 293 F. 2d 170 (C.A. 2). See also *N.L.R.B.* v. *Lewis,* 246 F. 2d 886 (C.A. 9); *Shamrock Dairy, Inc.,* 119 NLRB 998, 124 NLRB 494, enforced sub nom; *International Brotherhood of Teamsters* v. *N.L.R.B.,* 280 F. 2d 665, (C.A. D.C.), cert. denied, 364 U.S. 892. Bargainable issues such as serverance pay, seniority and pensions, among others, are necessarily of particular relevance and importance. Cf. *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543, 554; *Inland Steel Co.* v. *N.L.R.B.,* 170 F. 2d 247 (C.A. 7), cert. denied 336 U.S. 960; *N.L.R.B.* v. *Westinghouse Air Brake Co.,* 120 F. 2d 1004 (C.A. 3).

There can be no doubt that Respondents, by withholding all information of their intention to close

[4] It is not clear from the record whether the contract with Schodorf Body Company provided for the manufacture of the same type truck bodies previously manufactured at the Ozark plant.

down and terminate the operations at the Ozark plant, prevented the Union from bargaining over the effect of the plant closing on the employees. Moreover, in the circumstances of this case, we find no merit in Respondent's contention that it was not required to bargain with the Union because the Union failed to request bargaining "about the closing of Ozark." Indeed, the record evidence shows that the Union representatives were unaware of Respondents' decision to close the Ozark plant, and on February 20, when the Union steward sought information as to the duration of the layoff, Respondents' plant manager told him that the layoff was due to lack of work and was only temporary in nature. It thus appears that the Union, during the most critical period, and at the very time when bargaining would have been most productive, was completely unaware of Respondents' intention to close the Ozark plant permanently. After so concealing its intentions from the Union, Respondent cannot now persuasively argue that it was not required to bargain with the Union because the Union did not request such bargaining. Accordingly, on the basis of the entire record, and for the reasons set forth above, we agree with the Trial Examiner's finding that Respondents violated Section 8(a)(5) and (1) of the Act by closing the Ozark plant and discharging all employees in the unit without consulting with the Union or giving it an opportunity to bargain over the effects of such closing on the employees.

We turn next to the more difficult issue, namely, whether Respondents also violated Section 8(a)(5) and (1) by bypassing the statutory bargaining representative of the employees at the Ozark plant and failing to bargain over the decision to close the plant permanently. The Trial examiner found that Re-

spondents did so violate the Act. We agree with the Trial Examiner in this regard for the following reasons:

At the outset, and as we have heretofore found, Respondents Ozark, Hutco, and Mobilefreeze, during the critical period herein involved, functioned and operated as a single, integrated, multiplant enterprise, engaged principally in the manufacture, sale, and service of refrigerated truck bodies. In these circumstances we must view the closing of the Ozark plant only as a partial closing of the Respondents' enterprise, and not a complete going out of a business by Respondents. Thus, we are not here confronted with the question whether a decision to go out of business completely is a mandatory subject of bargaining under Section 8(a)(5) of the Act. Accordingly, we need not, and do not, determine the impact on that question of the Supreme Court's holding in *N.L.R.B.* v. *Darlington Mfg. Co.,* 380 U.S. 263. It is sufficient to note that that holding cannot be relevant to the issue before us which involves Respondents' duty to bargain about the *partial* closing of their business.[5] We perceive nothing in that portion of the *Darlington* decision dealing with the discriminatory partial closing of a business which suggests the inapplicability of the collective-bargaining requirement of the Act to Respondents' decision to close down the Ozark plant. Indeed, as the *Darlington* decision affrms the propriety of the application of Section 8(a)(3) to a partial closing of a business, it would be anomalous to find that Section 8(a)(5) is without governing authority in such situations.[6] We therefore find that the *Darlington* decision does not require dismissal of the complaint, and that the question of whether the

[5] *Royal Plating and Polishing Co., Inc.*, 152 NLRB 619, 622.
[6] *Ibid.*

Respondents violated the Act in unilaterally determining to close down the Ozark plant must be decided in the light of considerations set forth in the Supreme Court's decision in the *Fibreboard* case.[7]

In *Fibreboard,* the Supreme Court was faced with the question whether an employer's decision, motivated by economic considerations, to subcontract certain maintenance work performed by its employees, was covered by the phrase "terms and conditions of employment" within the meaning of Section 8(d) and was, accordingly, a matter about which the employer was obligated to bargain by virtue of Section 8(a)(5). In affirming our finding that subcontracting was a matter about which the employer must bargain, the Court commented (379 U.S. at 210):

> The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditons of employment." See Order of *Railroad Telegraphers* v. *Chicago & N.W.R. Co.,* 362 U.S. 300. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.

So here, a termination of employment was the necessary result of Respondents' decision to close the Ozark plant. Thus here, just as in *Fibreboard,* Respondents have failed to bargain concerning a "term or condition of employment."

We recognize, of course, that the Supreme Court's decision in *Fibreboard* was limited to the type of contracting out involved in that case, and did not ex-

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[7] *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203.

plicitly deal with the question whether an employer must bargain concerning a decision to terminate a portion of its operations. We further recognize that two Courts of Appeals have held, in reliance on the concurring opinion in *Fibreboard,* that a decision of this nature need not be bargained about. Thus, in *N.L.R.B.* v. *Adams Dairy, Inc.,* 350 F. 2d 108, cert. denied, 382 U.S. 1011, the Court of Appeals for the Eighth Circuit held that a managerial decision to substitute independent contractors for employees in the distribution of the employer's products was outside the mandatory bargaining requirements of the Act on the ground that it involved a "basic operational change" and a "partial liquidation and a recoup of capital investment."[8] Similarly, in *N.L.R.B.* v. *Royal Plating & Polishing Co.,* 350 F. 2d 191, the Court of Appeals for the Third Circuit held that a decision to shut one of an employer's two plants involved a "management decision to recommit and reinvest funds in the business" and a "major change in the economic direction of the Company,"[9] and, accordingly, that the employer was under no duty to bargain with the union respecting that decision.

With all respect to the Courts of Appeals for the Third and Eighth Circuit, we do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving "major" or "basic" change in the nature of the employer's business. True it is that decisions of this nature are, by definition, of significance for the employer. It is equally true, however, and ought not

[8] 350 F. 2d at 211. See also, *N.L.R.B.* v. *Burns Detective Agency*, 346 F. 2d 897 (C.A. 8).

[9] 350 F. 2d at 196.

be lost sight of, that an employer's decision to make a "major" change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood. As the Supreme Court said in dealing with a not dissimilar question in *Wiley* v. *Livingston,* 376 U.S. 543, 549:

> The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship . . . .

In short, we see no reason why employees should be denied the right to bargain about a decision directly affecting terms and conditions of employment which is of profound significance for them solely because that decision is also a significant one for management. Nor we do believe that the rationale which underlies both our decision in *Fibreboard* and the Supreme Court's decision in that case compels such a limitation. It was our view in *Fibreboard,* and the view of the Supreme Court, as we read the Court's opinion therein, that bargaining about contracting out might appropriately be required because to do so effectuated one of the primary purposes of the Act—"to promote

the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."[10] The Court there continued (*ibid*):

> To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

We think it plain the same may be said about a management decision to terminate a portion of the enterprise—termination, just as contracting out, is a problem of vital concern to both labor and management, and it would promote the fundamental purpose of the Act to bring that problem within the collective bargaining framework set out in the Act.

There is yet another significant respect in which the management decision involved in the instant case is similar to that in *Fibreboard* and ought also be the subject of collective bargaining. In *Fibreboard,* the Court noted that the factors which underlay the employer's decision to contract out were primarily related to the cost of labor (size of the work force, fringe benefits, overtime payments) and that these matters had long been regarded as "peculiarly suitable for resolution within the collective bargaining framework".[11] In the instant case the factors relied upon by Respondents as justifying their decision to close the Ozark plant were (as set out in Ozark's answer to the complaint): excessive man hours were required for the production of custom refrigerated truck bodies; the truck bodies produced and sold

[10] 379 U.S. at 211.

[11] 379 U.S. at 213–214.

would not perform properly because of defective workmanship, necessitating a return of the bodies to the plant at disastrous expense to Respondents; and the plant facilities were not efficiently laid out. At least the first two of these—rate and quality of production—are traditional subjects of collective bargaining and would appear as susceptible of resolution within the collective-bargaining framework as the labor cost issues involved in *Fibreboard.* A decision to contract out the work performed at the Ozark plant, if substantially predicated on these factors would surely, under the rationale of *Fibreboard,* be subject to the bargaining requirements of the Act; we see no reason why a decision to close the Ozark plant, predicated on the same considerations, ought not be equally subject to those bargaining requirements.

The argument has been made that to compel an employer to bargain about a decision to relocate or terminate a portion of his business would significantly abridge his freedom to manage the business. In the first place, however, as we have pointed out time and again,[12] an employer's obligation to bargain does not include the obligation to agree, but solely to engage in a full and frank discussion with the collective-bargaining representative in which a *bona fide* effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business.

But, it has been argued, imposing the obligation to bargain, which includes a requirement that the bar-

[12] See, e.g., *Town & Country Mfg. Co.*, 136 NLRB 1022, 1027, enfd. 316 F. 2d 846 (C.A. 5).

gaining be in good faith, and which precludes unilateral action absent sufficient bargaining,[13] all subject to the surveillance of this Board, and ultimately of the courts, so impedes management flexibility in meeting business opportunities and exigencies that the statute ought not be interpreted to require such bargaining. As to this, however, the answers are plain. Initially, Congress made the basic policy determination, in enacting the National Labor Relations Act, that, despite management's interest in absolute freedom to run the business as it sees fit, the interests of employees are of sufficient importance that their representatives ought be consulted in matters affecting them, and that the public interest, which includes the interests of both employers and employees, is best served by subjecting problems between labor and management to the mediating influence of collective bargaining.

Secondly, the Supreme Court held in *Fibreboard,* affirming our decision therein, that such limitations on absolute freedom to manage the business as are inherent in compelling bargaining on contracting out are justified by the potential gains of requiring bargaining. If this is true with respect to decisions regarding contracting out, we think it is *a fortiori* true with respect to decisions regarding the relocation or termination of a portion of the business. Decisions as to contracting out are not infrequent. To require bargaining as to such decisions does arguably impose certain constraints on management in the normal operation of the enterprise (ameliorated, of course, by management's freedom to negotiate arrangements concerning the future contracting out of work as the need arises). Yet, it is plain, bargaining over contracting out is required. Decisions whether to relo-

[13] See *Shell Oil Co.*, 149 NLRB 305.

cate or terminate a portion of the business surely arise with less frequency in the life of the typical corporate enterprise than decisions whether to contract out certain work. Indeed, such decisions are extremely rare for most employers. Hence, to require bargaining over these decisions appears, if anything, *less* of a limitation on management flexibility in running the business than to require bargaining about contracting out. Accordingly, we think it no significant intrusion on management freedom to run the business to require that an employer—once he has reached the point of thinking seriously about taking such an extraordinary step as relocating or terminating a portion of the business—discuss that step with the bargaining representative of the employees who will be affected by his decision. Furthermore, such limitation on *absolute* employer freedom as is involved in imposing a bargaining requirement is amply justified by the interest of the employees in being consulted about a decision with profound impact on them, and by the public interest in industrial peace. Cf. *Wiley* v. *Livingston,* 376 U.S. 543, 549.

It has been contended,[14] however, that issues of contracting out, plant removal or shut-down are impossible of resolution by collective bargaining, that there is an irreconcilable conflict between the demands which bargaining representatives are compelled—by internal political necessities—to make, on the one hand, and the competitive and managerial necessities which employers are compelled to follow, on the other. Hence, it is urged, these matters must by a narrow construction of the law be committed to the sole discretion of employers as an unconditional management prerogative.

[14] See, e.g., F. A. O'Connell, '*New Ferment in Labor Relations*'—*Employer View*, 61 LRR 110.

The conduct and experience of a growing number of employers and unions[15] attest to the complexity and difficulty of such problems, but prove, contrary to the above claim, that they can be and are resolved, and support the rationale of our decisions that such matters properly come within the scope of the bargaining obligation under the Act.

Thus, a Bureau of Labor Statistics study of 1687 major collective bargaining agreements in effect at the beginning of 1959 shows that there were 378 with express limitations on contracting out work that might otherwise be available to employees in the bargaining unit.[16] Again, a study of bargaining in 74 plants relating to contracting out by Professor Margaret K. Chandler,[17] showed that 32 percent had collective-bargaining contracts with clauses governing contracting out. Reflecting the growing number of cases in which mutual discussions have even succeeded in averting shut-downs is an article in the *Wall Street Journal,* June 10, 1964, describing a number of situations in which unions accepted cuts in wages and fringe benefits to save employee jobs threatened by proposed plant relocation or closure.[18] In short, bar-

[15] See *Fibreboard*, *supra*, at 211—("While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining"). See also, *Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346; Cox and Dunlop. *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 405–406.

[16] *Fibreboard*, *supra*, at 212, footnote 7.

[17] Chandler, *Management Rights and Union Interests*, p. 217. (1964).

[18] See, also, *Business Week*, February 29, 1964 (Company agrees to retain plant in Philadelphia in return for union acquiescence in changed work rules); Oswald, *Easing Job Changes by Advance Notice*, AFL–CIO Federationist, Dec. 1965, p. 13; Seidman, *The Union Agenda for Security*, 86 Monthly Labor Review 636, 640 (1963).

gaining about plant removal and shutdown, albeit not as widespread as bargaining about contracting out (perhaps because of the greater frequency with which the latter problem arises), does take place and need not be futile. Under these circumstances, we see no justification for interpreting the statutory bargaining obligation so narrowly as to exclude plant removal and shutdown from its scope.

Finally, while meaningful bargaining over the *effects* of a decision to close one plant may in the circumstances of a particular case be all that the employees' representative can actually achieve, especially where the economic factors guiding the management decision to close or to move or to subcontract are so compelling that employee concessions cannot possibly alter the cost situation, nevertheless in other cases the effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised. An interpretation of the law which carries the obligation to "effects", therefore, cannot well stop short of the decision itself which directly affects "terms and conditions of employment".

The Remedy

While the Trial Examiner correctly found that Respondent violated the Act in failing to bargain with the Union over the closing of the Ozark plant, by way of remedy, he ordered, *inter alia,* backpay for the employees until one of the following conditions occurred: (1) reaching mutual agreement with the Union relating to the subjects which the Respondents are hereby required to bargain about; (2) bargaining to a genuine impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of

the Respondents' notice of their desire to bargain with the Union; or (4) the failure of the Union to bargain thereafter in good faith. We agree that backpay is appropriate under the facts in this case, but we do not agree with the Trial Examiner that backpay liability is to continue until one of the above conditions occur.

The Board has indicated that backpay orders are appropriate means of remedying 8(a)(5) violations of the type involved herein, even where such violations are unaccompanied by a discriminatory shutdown of operations.[19] In fashioning remedies the Board bears in mind that the remedy should be adapted to the situation that calls for redress,[20] with a view toward "restoring the situation as nearly as possible, to that which would have obtained but for [the unfair labor practice]."[21] Here, the unfair labor practice was the unilateral close-down of the Ozark plant without giving the Union notice or opportunity to discuss the decision to close down and matters that would affect the employees involved. The nature of the violations would justify directing the Respondents to restore the situation existing prior to the closedown of the Ozark operation by reestablishing the discontinued operation. But this appears impractical as the plant has been shut down for a considerable period of time and the machinery has been shipped some distance away.[22] Further, we down the Ozark operation was prompted solely by are satisfied that the Respondents' decision to close

[19] *Royal Plating and Polishing Co., Inc.*, 148 NLRB 545, and cases cited therein at footnote 7.

[20] *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333.

[21] *Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194.

[22] See *N.L.R.B.* v. *American Mfg. Co. of Texas*, 351 F. 2d 74 (C.A. 5).

pressing economic necessity.[23] However, if we are to effectuate the policies of the Act and achieve responsible collective bargaining, it is essential that a backpay remedy be ordered, one that fits the circumstances of this case. We think the Trial Examiner's recommendation as to the time that backpay should cease, that is the occurrence of one of the aforementioned conditions, is too speculative. Accordingly, we shall order the Respondent to make whole the employees for any loss of pay suffered by them as a result of the Respondents' unlawful refusal to bargain from the time they made the decision to close the plant at the end of January 1964, to the date the Ozark plant was closed on March 1, 1964, by paying to each of them a sum of money equal to the amount each would have earned as wages from the date of his termination during that period until the Ozark plant was closed. Backpay shall be based upon the earnings which the terminated employees would normally have received during the applicable period less any net interim earnings, and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289; *N.L.R.B.* v. *Seven-Up Bottling Company of Miami, Inc.,* 344 U.S. 344; with interest thereon, *Isis Plumbing and Heating Company,* 138 NLRB 716.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondents, Ozark Trailers, Incorporated, Ozark, Missouri, Hutco Equipment Company, Springfield, Missouri, and Mobilefreeze,

[23] See *Renton News Record, etc.,* 136 NLRB 1294.

Inc., Parsons, Kansas, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommendations, as herein modified:

1. Amend paragraph 1(b) of the Trial Examiner's Recommended Order by deleting therefrom subparagraph (b) and inserting in lieu thereof the following:

"(b) Failing and refusing to bargain collectively with International Union, Allied Industrial Workers of America, Local No. 770, AFL–CIO, as the exclusive representative of their Ozark plant employees, concerning the decision to close the Ozark plant and the effects of the discontinuance of their Ozark plant operations on such employees."

2. Add to the Trial Examiner's Recommendations as subparagraph 1(c) the following:

"(c) Unilaterally closing down any of their plants without prior notice to and bargaining with the collective-bargaining representative or representatives, if any, of employees in such plant concerning the decision to close down and its effects."

3. Renumber the present subparagraph 1(c) to 1(d).

4. Paragraph 2(c) is amended by changing the period appearing at the end of the paragraph to a comma, and by adding the words "as modified by the section entitled 'Remedy' of the Board's Decision and Order."

5. Amend the Notice attached as an Appendix to the Trial Examiner's Decision by deleting therefrom the second indented paragraph on page (1) and insert therein the following two paragraphs:

> WE WILL NOT fail and refuse to bargain collectively with International Union, Allied Industrial Workers of America, Local No. 770, AFL–CIO, as the exclusive representative of

our Ozark plant employees, concerning the decision to close the Ozark plant and the effects of the discontinuance of our Ozark plant operations on such employees."

WE WILL NOT unilaterally close down any of our plants without prior notice to and bargaining with the collective-bargaining representative or representatives, if any, of employees in such plant concerning the decision to close down and its effects.

Amend the first full paragraph on page (ii) of the Appendix by changing the period appearing at the end of the paragraph to a comma, and by adding the words "as modified by the section entitled 'Remedy' of the Board's Decision and Order."

Dated, Washington, D.C.

FRANK W. MCCULLOCH,
Chairman,
JOHN H. FANNING,
Member,
GERALD A. BROWN,
Member,
SAM ZAGORIA,
Member,

[SEAL] *National Labor Relations Board.*

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